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In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD H. GREEN AND HELEN D. GREEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statute of limitations on the collection of the unpaid withholding tax liabilities of petitioner Richard Gens was suspended under Section 6503(b) of the Internal Revenue Code from the date that an involuntary petition in bankruptcy was filed against him to the date that the petition was dismissed, and for six months thereafter.

2. Whether petitioner Helen Gens was not entitled to any refund of overpayments reported on the joint income tax returns she filed with her husband, where she failed to prove that she had made any tax payments for the years in issue.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Acme Harvester Co. v. *Beekman Lumber Co.*, 222 U.S. 300	6, 10
Byrne, Matter of, 5 Bankr. 556	7
England v. *Doyle*, 281 F.2d 304	6
Ford, Bacon & Davis, Inc. v. *Holahan*, 311 F.2d 901, cert. denied, 373 U.S. 913	7, 10
Glaubke v. *United States*, 41 A.F.T.R. 2d 759	11
Lazarus v. *Prentice*, 234 U.S. 263	6, 10
McAuley v. *United States*, 525 F.2d 1108	8, 9, 10
Rush, In re, 10 Bankr. 518	9
Schilling v. *McAllister Brothers, Inc.*, 310 F.2d 128	7
United States v. *Malkin*, 317 F. Supp. 612	8
United States v. *Verlinsky*, 459 F.2d 1085	8

Statutes and rule:

Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, Section 6(a), 94 Stat. 3407	7-8
Federal Tax Lien Act of 1980, Pub. L. No. 89-719, 80 Stat. 1125	8
Section 106(a), 80 Stat. 1139	6
Internal Revenue Code of 1954 (26 U.S.C.):	
Section 6402(a)	11
Section 6502	5
Section 6503(b)	4, 5, 6, 8, 9

Statutes and rule—Continued — Page

Section 6503(i) 7
Section 6672 ..... 2, 3, 4, 5, 8, 11

Bankruptcy Act, 11 U.S.C. (1976 ed.) 1 *et seq.*:

Section 11a (11 U.S.C. (1976 ed.) 29(a)) 7
Section 70a (11 U.S.C. (1976 ed.) 110(a)) 7
Section 70d (11 U.S.C. (1976 ed.) 110(d)) 7
Section 70d(1) (11 U.S.C. (1976 ed.) 110 (d)(1)) 7

Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2549 7
Bankruptcy Rules, Rule 401(a) 8

Miscellaneous:

4A *Collier on Bankruptcy* (14th ed. 1978) 6
H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954) 6
Rev. Rul. 74-611, 1974-2 Cum. Bull. 399 11
Rev. Rul. 80-7, 1980-1 Cum. Bull. 296 11
S. Rep. No. 1708, 89th Cong., 2d Sess. (1966) 8

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No. 82-84

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Court of Claims issued two opinions. The first opinion (Pet. 10-23) is reported at 615 F.2d 1335, and the second (Pet. 24-28) is reported at 673 F.2d 366.

JURISDICTION

The judgment of the Court of Claims was entered on February 24, 1982 (Pet. 24). A motion for rehearing was denied on April 2, 1982. The petition for a writ of certiorari was filed on June 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

Petitioners Richard H. Gens and Helen D. Gens filed this income tax refund suit in the Court of Claims seeking a refund of overpayments in the total of $74,585.14 on their joint federal income tax returns for 1968, 1970, and 1971 (Pet. 10; Trial Judge Op. 6).[1] The Commissioner of Internal Revenue applied these overpayments to certain assessments of unpaid withholding and FICA taxes which had been made on March 19, 1971, and January 15, 1973, under Section 6672 of the Internal Revenue Code of 1954 (26 U.S.C.) against petitioner Richard H. Gens as a person responsible for the failure of 21 nursing home corporations to pay over income and social security taxes withheld from their employees for one or more quarters of 1970 (Pet. 10-14; Trial Judge Op. 6).[2] No

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[1] "Trial Judge Op." refers to the findings of fact of the trial judge, which were adopted by the Court of Claims, but were not printed in its opinion (Pet. 25).

[2] The overpayments for each year which were credited against the Section 6672 liabilities of petitioner Richard Gens were as follows (Trial Judge Op. 6):

1968 joint return	$32,628.13
1970 joint return	39,802.09
1971 joint return	2,154.92
Total amount credited	$74,585.14

On their federal income tax return for 1968, petitioners reported a tax liability of $50,328.97, which was satisfied as follows (Pet. 26; Trial Judge Op. 6):

Federal income tax withheld	$28,444.60
Excess FICA tax withheld	2,468.58
Cash payment	19,415.79

At the time of trial, petitioner Richard Gens could not recall whether the cash payment made in 1968 was made with his funds or with his wife's funds (Pet. 26). No W-2 forms were

liabilities under Section 6672 were assessed against petitioner Helen D. Gens (Trial Judge Op. 6).

On October 18, 1971, an involuntary petition seeking to have petitioner Richard Gens adjudicated a bankrupt was filed by some of his creditors in the United States District Court for the District of Massachusetts. On April 3, 1972, the bankruptcy court held that Richard Gens was not a bankrupt and dismissed the petition (Pet. 12).

Richard Gens made partial payments with respect to the Section 6672 assessments against him and filed timely claims for refund of these payments. In 1974, after his claims for refund had been denied, petitioner Richard Gens filed a timely suit for refund

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produced to show the breakdown of the 1968 withholding payments between Richard Gens and Helen Gens (Trial Judge Op. 7).

Petitioners' 1968 overpayment arose through the application of a net operating loss carryback in the amount of $98,614.12 from their 1971 joint return (Trial Judge Op. 6, 8). As a result of this carryback, petitioners claimed a refund of overpaid 1968 taxes in the amount of $42,750.83 (Trial Judge Op. 6). This amount, plus $342.17 in interest, was credited to petitioners by the Internal Revenue Service (Trial Judge Op. 6). The resulting credit was applied against other tax liabilities as follows (Trial Judge Op. 6):

Total credit	$43,093.00
1969 Joint tax liability	−7,185.67
	35,907.33
1972 Joint tax liability	−3,279.20
Balance to Section 6672 liability	$32,628.13

Petitioners' 1970 and 1971 refund claims resulted from excessive withholding from the wages of petitioner Richard Gens in those years (Trial Judge Op. 6, 8). These claims were disallowed in full because the overpayments had been applied to offset the Section 6672 liabilities of Richard Gens (Trial Judge Op. 6).

in the Court of Claims. At the same time, petitioners Richard and Helen Gens filed a separate timely suit for refund of the income tax overpayments described above (Pet. 13).

On November 30, 1977, the government filed a counterclaim in this action seeking judgment against petitioner Richard Gens for $109,968.28 in interest and $61,541.39 in unpaid assessments (Trial Judge Op. 9). The interest included in this counterclaim represented the interest due on the assessments of March 19, 1971, from the date of assessment until the underlying taxes were paid on January 17, 1977 (Pet. 14).[3]

In its first opinion in this case, the Court of Claims held that the government's counterclaim for interest on the assessments of March 19, 1971, was timely filed because the involuntary bankruptcy petition filed against petitioner Richard Gens on October 18, 1971, had suspended the running of the statute of limitations under Section 6503(b) of the Code until the petition was dismissed on April 3, 1972, and for six months thereafter (Pet. 18-22). The court pointed out that one of the purposes of the federal bankruptcy statute is to preserve intact the property of an alleged bankrupt from the date of the filing of a petition in bankruptcy, so that the estate can be administered under the statute if the debtor is later adjudicated bankrupt (Pet. 20-21). Accordingly, the property of the debtor was deemed to be under the control of the bankruptcy court while the petition was pending, even if it was later dismissed (Pet. 21-22). With respect

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[3] After this counterclaim was filed, the government recomputed the interest and conceded that petitioner Richard Gens was not liable for some of the outstanding Section 6672 assessments, thereby reducing its claim to $109,543.33 in interest and $53,961.01 in Section 6672 assessments, for a total counterclaim of $163,504.34 (Trial Judge Op. 9).

to the claim of petitioner Helen Gens for the refund of one half of the income tax overpayments made with respect to petitioners' 1968, 1970, and 1971 joint returns, the Court of Claims remanded the case to the trial judge for a factual determination as to the contribution of petitioner Helen Gens to petitioners' joint taxable income and as to her contribution to the overpayments in question (Pet. 22-23).

In its second opinion, the Court of Claims affirmed the holding of the trial judge that Helen Gens was not entitled to a refund of any of the overpaid taxes for the years in question because the petitioners had failed to prove that any part of the overpayment had been made with her funds (Pet. 26-27). The court found that she was not employed during the years in issue, and that there was no evidence to show that her funds were the source of any part of petitioners' cash payment of taxes in 1968 (Pet. 26). Accordingly, the court held that the Commissioner had properly credited the entire amount of petitioners' income tax overpayments against the separate liabilities of petitioner Richard Gens under Section 6672 of the Internal Revenue Code (Pet. 28).

ARGUMENT

1. Petitioners argue (Pet. 7-8) that the filing of an involuntary petition in bankruptcy against petitioner Richard Gens did not suspend the running of the six-year statute of limitations (Section 6502 of the Internal Revenue Code of 1954) on the collection of his assessed tax liabilities under Section 6503(b) of the Internal Revenue Code of 1954, because the petition was dismissed on the ground that he was not a bankrupt and no trustee was ever appointed to take control of his property.

Section 6503(b)[4] provides that the statute of limitations on the collection of a tax assessment "shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States * * *, and for 6 months thereafter." This provision was added as part of the 1954 Code, to replace existing law which authorized collection of unpaid income taxes, in the case of a bankruptcy or receivership, "within 6 years after the termination of the proceedings" and to provide "a uniform rule applicable to all taxes." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A415 (1954). The Court of Claims correctly construed this provision to require suspension of the applicable statute of limitations until the proceedings in bankruptcy were terminated by dismissal of the petition.

It has long been the rule that generally, "upon the filing of the petition, all of the bankrupt's property in his actual or constructive possession passes into the custody and control of the bankruptcy court. The property and title thereto are said to be *in custodia legis* in the court until the appointment and qualification of a trustee in whom the title may be vested [footnotes omitted]." 4A *Collier on Bankruptcy*, ¶ 70.05, at 73 (14th ed. 1978). See *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U.S. 300, 307 (1911); *Lazarus* v. *Prentice*, 234 U.S. 263, 266-267 (1914). During the period between the filing of the petition and the appointment of a trustee, the debtor holds title as "trustee" for his creditors. *England* v. *Doyle*, 281 F.2d 304, 306 (9th Cir. 1960). If the debtor is later adjudicated a bankrupt, the title of

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[4] As amended by Section 106(a), Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1129.

the trustee in bankruptcy, which is vested "as of the date of the filing of the petition initiating a proceeding under * * * [the Bankruptcy] Act" (Bankruptcy Act, Section 70a (11 U.S.C. (1976 ed.) 110(a), relates back to the date the petition was filed. See Section 70d of the Bankruptcy Act (11 U.S.C. (1976 ed.) 110(d)); *Ford, Bacon & Davis, Inc.* v. *Holahan*, 311 F.2d 901, 902-903 (5th Cir. 1962), cert. denied, 373 U.S. 913 (1963). In an involuntary bankruptcy, such as occurred here, the alleged bankrupt is entitled to retain possession of his property until he is adjudicated bankrupt, or until a receiver is appointed, and, during the interval between the filing of the petition and adjudication or the appointment of a receiver, the alleged bankrupt may transfer personal property in the ordinary course of business, but only for "present fair equivalent value," and not for past consideration. Section 70d(1) of the Bankruptcy Act (11 U.S.C. (1976 ed.) 110(d)(1)). *Schilling* v. *McAllister Brothers, Inc.*, 310 F.2d 123 (2d Cir. 1962).

Moreover, the filing of an involuntary petition, like the filing of a voluntary petition, activates the automatic stay provisions of Section 11a of the Bankruptcy Act (11 U.S.C. (1976 ed.) 29(a)). Although the automatic stay of creditors' actions under Section 11a (11 U.S.C. (1976 ed.) 29(a)),[4] did not apply to

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[4] On November 6, 1978, Congress enacted Pub. L. No. 95-598, 92 Stat. 2549, revising the bankruptcy laws and enacting Title 11 of the United States Code into positive law. Under the new Bankruptcy Code, the automatic stay provision contained in 11 U.S.C. (Supp. IV) 362 is applicable to all pre-petition claims against the debtor. The stay thus affects nondischargable tax claims in all cases subject to the Bankruptcy Code. *Matter of Byrne*, 5 Bankr. 556 (W.D. Pa. 1980). See Section 6508(i) as added by Section 6(a) of the Bank-

nondischargeable tax debts, such as the Section 6672 liabilities in issue in this case (see Bankruptcy Rules, Rule 401(a)), the filing of the petition and the resulting transfer of the debtor's assets into the custody of the bankruptcy court created substantial uncertainty concerning the availability of assets for the satisfaction of his nondischargeable taxes.

As the Senate Finance Committee pointed out in its consideration of the legislation that resulted in the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, the purpose of Section 6503(b) of the Internal Revenue Code is to prevent the statute of limitations on the collection of taxes from running against the government while the taxpayer's assets are not subject to administrative collection procedures because they are in the custody or control of a court. S. Rep. No. 1708, 89th Cong., 2d Sess. 24 (1966). In cases in which a bankrupt's adjudication has been followed by protracted proceedings for the settlement of the bankrupt estate, the courts have reached differing conclusions as to when the Section 6503(b) suspension of the statute of limitations ceases and the statute begins again. *United States* v. *Verlinsky*, 459 F.2d 1085, 1088 (5th Cir. 1972) (suspension lifted by the discharge of the debtor); *McAuley* v. *United States*, 525 F.2d 1108, 1114 (9th Cir. 1975) (suspension lifted when the time for filing claims against the estate expires); *United States* v. *Malkin*, 317 F. Supp. 612, 615-617 (E.D. N.Y. 1970) (suspension lifted

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ruptcy Tax Act of 1980, Pub. L. No. 96-589, 94 Stat. 3407, providing for the suspension of the running of the statute of limitations on collection of federal taxes, "in a case under title 11 of the United States Code, * * * for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting * * *."

when the bankrupt estate is closed and the trustee in bankruptcy is discharged).

This case, however, does not present such difficult problems of statutory construction. The assets of petitioner Richard Gens were in the custody of the bankruptcy court for less than six months, *i.e.*, from October 18, 1971, when the involuntary petition against him was filed, to April 3, 1972, when the petition was dismissed (Pet. 12). This period, plus the statutory six-month additional suspension provided for in Section 6503(b), brings the total suspension of the statute of limitations in this case to 351 days, *i.e.*, from October 18, 1971, to October 3, 1972. Unlike the administration of a bankrupt estate, which may be prolonged by the existence of numerous disputed claims, uncertainties as to the status of secured creditors, or other problems, a determination that the debtor is not a bankrupt should normally occur within a short time after the filing of an involuntary petition. If the debtor is, in fact, solvent he will be strongly motivated to obtain a prompt dismissal of the petition in order to minimize the disruption of his business. Conversely, if he is insolvent, the petitioning creditors will be anxious to avoid delays during which, in the absence of an order for relief or an order appointing an interim trustee, the debtor may continue to dissipate the assets of the estate. See *In re Rush*, 10 Bankr. 518, 523-525 (N.D. Ala. 1980). As the court pointed out in *McAuley* v. *United States*, *supra*, 525 F.2d at 1113:

> The primary limitation on the collection rights of the United States is caused by the confusion created by the dividing of the bankrupt's property into exempt and non-exempt estates, and the filing of creditors' claims against the estate. * * * The period during which property is determined to be exempt or not is fairly short.

Here, because the petition in question was an involuntary one, there was an initial short period of uncertainty, during which the debtor had an opportunity to contest the allegations in the petition. During this initial period, the uncertainty engendered by the existence of the petition was similar to that described by the court in *McAuley* v. *United States*, *supra*. The bankrupt's exempt property had not yet been set apart from the property of the estate, but the rights of the trustee, if one was eventually appointed, to the property of the estate had already been determined through the doctrine of relation back, *Ford, Bacon & Davis, Inc.* v. *Holahan*, *supra*, 311 F.2d at 902-903. As this Court held in *Acme Harvester Co.* v. *Beekman Lumber Co.*, *supra*, 222 U.S. at 307, "[t]he exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition."

Given the serious limitations on the government's ability to collect its taxes during the pendency of an involuntary petition in bankruptcy, the Court of Claims correctly held that the statute of limitations on collection was suspended under Section 6503(b) of the Internal Revenue Code from the date the petition was filed against Richard Gens until it was dismissed, and for six months thereafter. Cf. *Lazarus* v. *Prentice*, *supra*, 234 U.S. at 266-267 (upon filing of petition and adjudication in bankruptcy, receiver entitled to take possession of bankrupts' property *in custodia legis* and hold it until trustee appointed, or bankruptcy petition dismissed).

2. Petitioners also contend (Pet. 8) that the Court of Claims erred in holding that Helen Gens had failed to prove that she was entitled to a refund of any part of the joint income tax overpayments which the Internal Revenue Service had applied against the sepa-

rate Section 6672 liabilities of Richard Gens. Nothing in this strictly factual question warrants review by this Court. As the Court of Claims correctly pointed out (Pet. 26), Section 6402(a) of the Internal Revenue Code provides that the Commissioner is authorized to refund an overpayment to "the person who made the overpayment." Here, the court found that during the years in question Helen Gens had contributed nothing to the overpayments (Pet. 26, 28). It therefore properly concluded that Helen Gens' proportionate share of the overpayments on the joint returns was necessarily zero. *Glaubke* v. *United States*, 41 A.F.T.R. 2d 759 (E.D. Va. Jan. 3, 1978); Rev. Rul. 74-611, 1974-2 Cum. Bull. 399; Rev. Rul. 80-7, 1980-1 Cum. Bull. 296.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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